

In the High Court of Judicature at Madras

Dated: 18.01.2006

Coram:

The Honourable Mr. Justice S.R.SINGHARAVELU

Civil Revision Petition (PD) No. 2006 of 2004
And

C.M.P.No.19223 of 2004 and V.C.M.P.No.7589 of 2005

Velayutham S/o Somasundaram
22F, Rajambal Nagar,
Manjjakuppam, Cuddalore.

... 17th Respondent/
proposed 17th defendant/
Revision Petitioner.

Versus

1.Venugopal, S/o Adhimoolam,
Koothapakkam,
Thirupapuliur,
Cuddalore.

... Petitioner/Plaintiff/
1st Respondent.

2.The Collector,
South Arcot District
Cuddalore.

3.The Settlement Tahsildar,
Tanjore.

4.Pandian S/o Dhandapani Chettiar

5.Sankar, S/o Dhandapani Chettiar

6.Balachandra Chettiar
S/o Dhandapani Chettiar

7.Arumugham, S/o Ramaswamy Padayachi

8.Thirunavukarasu, S/o Palanipillai

9.Manickam, S/o Palanipillai

10.Sankaralingam, S/o Palanipillai

11.Shanmugham, S/o Palanipillai

12.Chandran @ Sankaran, S/o Subramanian.

13.Sasikumar, S/o Subramanian.

... Respondents 1 to 5,9,11 to 16/
Defendants 1 to 5,9,11 to 16/
Respondents

Civil Revision Petition under Article 227 of the Constitution of India against the order dated 10.01.2004 passed in I.A No.142 of 2002 in O.S.No.264 of 2001 on the file of the Principal Subordinate Judge, Cuddalore.

For Petitioner : Mr.R.Sunilkumar for
M/s Usha Ramanan
For Respondents : Mr.Dr.G.Krishnamurthi
for R1.
No appearance for R2 to 13.

ORDER

This Civil Revision is preferred by the proposed 17th Defendant in the suit who was impleaded as Legal Representative of the deceased 10th Defendant by name Somasundaram and who died on 10.10.1993.

2. The first Respondent/Plaintiff has filed O.P.No.17 of 1989 on the file of the Sub-Court, Cuddalore, seeking to declare him as an informa pauper, declaration of his title to nine items of suit properties situated in Koothapakkam Village, Cuddalore Taluk and for recovery of possession on the ground that the District Revenue Officials arrayed as first and second Defendants were influenced by the Defendants 3 to 6, engulfing his property unlawfully under the guise of patta proceedings and also in collusion with defendants 7 and 9. In the Original Petition, it was further alleged that the deceased 10th Defendant Somasundaram had also purchased one specific portion of the suit property as per a sale deed dated 26.6.1980. Among 9 items, subject matter of suit, the allegation against the deceased 10th Defendant whose Legal Representative was arrayed as Revision Petitioner, is that one specific portion of the subject matter of the suit was acquired by 10th Defendant under the guise of a sale deed dated 26.6.1980. Unfortunately, the Original Petition has not been drafted in such a way to include a prayer to set aside the said sale. However, delivery of possession was required in respect of all suit items. Since that Original Petition regarding indigent issue was dismissed on 18.9.1992, the first Respondent/Plaintiff preferred appeal before this Court in C.M.A.No.1313 of 1993.

3. A poor man who could not pay Court Fees although he filed the Original Petition before the Sub-Court, Cuddalore in the year 1989, was able to succeed in treating him as informa pauper, only on 16.3.2001, by virtue of the order of this Court in C.M.A.No.1313 of 1993. It is thereafter, the O.P., was converted into suit in O.S.No.264 of 2001 on the file of Sub-Court, Cuddalore, where the first Respondent/the sole plaintiff filed an application in February, 2002 in I.A.No.142 of 2002, to implead this Revision Petitioner as Legal Representative of the deceased 10th Defendant Somasundaram, on the ground that he had knowledge of death of the 10th Defendant only on 4.12.2001. True, it is that there was no petition to set aside the abatement filed by the plaintiff in the trial Court. But considering the fact that similar application in I.A.No.543 of 2002 was allowed on 4.6.2003 in getting impleaded the Defendants 18 to 21 as Legal Representatives of the deceased 6th Defendant and also by considering the fact that the said application to implead the Legal Representative of 10th Defendant was within 90 days from the date of knowledge of death, the Trial Court had entertained that application and allowed the same, which is the order agitated here.

4. True, it is that Article 120 of the Limitation Act provides that the time for preferring application to implead the Legal Representatives of deceased/defendant is 90 days from the actual date of death and not from the date of information of such death to the plaintiff. In this case, the 10th Defendant Somasundaram died on 10.10.1993. Since no steps have been taken to implead the Legal Representatives of the deceased within 90 days from the actual date of death, as contemplated under Article 120 of the Limitation Act, the suit against the 10th Defendant gets abated automatically.

5. According to the learned counsel for the Revision Petitioner, without filing an application to set aside the abatement caused against the 10th Defendant, and without even filing an application for condoning the delay in filing the application to implead the Legal Representative of the 10th Defendant, the impugned order passed by the trial Court is erroneous.

6. In this connection, reliance was placed by the Revision Petitioner in a case law reported in Union of India v. Ram Charan (AIR 1964 SC 215), which referred to an earlier decision of a Full Bench of Punjab High Court, in Firm Dittu Ram Eyedan v. Om Press Co. Ltd., (AIR 1960 Punj 335). In the above cited Ram Charan's case (supra), there was a money decree passed against the Union of India on 6.1.1955 at the instance of plaintiff Ram Charan, who died on 21.7.1957. In the appeal preferred by Union

of India before the High Court of Punjab, an application to implead the Legal Representatives of the deceased Ram Charan was filed on 18.3.1958 with an affidavit to the effect that they had knowledge of the death of Ram Charan only on 3.2.1958. Among the two legal heirs proposed in the application filed by the Union of India, one was the widow and the other was the adopted son of deceased Ram Charan. The widow contended that she alone was the Legal Representative of the deceased Ram Charan, based upon a Will in her favour. Therefore, she wanted to take up the question of abatement as a preliminary point. The appeal filed by the Union of India was dismissed as abated. A Special Leave Petition was preferred by the Union of India, before the Supreme Court, where it was held that as the defendant not even mentioned the fact of abatement in the affidavit filed in support of the application to implead the Legal Representatives of the deceased, the same cannot be entertained.

7. The above said decision of the High Court of Punjab, which was confirmed by the Supreme Court in (AIR 1964 SC 215) (supra), relied on the Full Bench of Punjab High Court, reported in Firm Dittu Ram Eyedan v. Om Press Co. Ltd., (AIR 1960 Punj 335), which held that ignorance of the death was not a sufficient cause for setting aside the abatement, when an application to bring the Legal Representatives of the deceased on the record, was made after the expiry of the period of limitation, as the law imposed an obligation on the person applying for bringing the Legal Representatives of the deceased on the record and he had, therefore, to show absence of want of care.

8. As against which before the Supreme Court the appellant/defendant viz., the Union of India in the case of Ram Charan raised the point that the High Court itself has got inherent power to implead the legal representatives of the deceased to do full justice to the party. It was held that there was no force in that contention and that the Court is not to invoke its inherent powers under Section 151 C.P.C., for the purpose of impleading the legal representatives of the deceased respondent, if the suit had abated on account of the appellant in not taking appropriate steps within time to bring the legal representatives of the deceased party on the record, and when its application for setting aside the abatement is not allowed on account of its failure to satisfy the Court that there was sufficient cause for not filing the application for impleading the legal representatives of the deceased in time and for not applying for the setting aside of the abatement within time.

9. For the next contention raised by the Union of India before the Supreme Court in the above said Ram Charan's case, that the expression "sufficient cause" should be liberally considered in order to advance the cause of justice, it was held that the provisions of the Code are with a view to advance cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement.

10. Even in the case reported in AIR 1960 Punjab 335 (FB) (supra) which was relied on in the above said Ram Charan's case, the following was observed:-

"The above is a representative, though not an exhaustive review of the case law expressing somewhat divergent views. On the one side through the wide gamut of judicial decisions three currents are noticeable. There is the extreme view which is to the effect that through lapse of time a valuable right is secured and it should not be extended in the absence of strong grounds and the burden lies heavily upon the person seeking indulgence, of showing sufficient cause justifying delay in bringing the legal representatives on the record within the period prescribed. On the other extreme is the view expressed in decisions of Patna, Madras and Nagpur High Courts that after notice has been served on the respondent, appellant's duty comes to an end and he is not bound to inquire as to whether respondent is dead or alive. Neither of these views appears to be justified.

Law casts a duty upon the plaintiff or the appellant, as the case may be, to bring the legal

representatives of the deceased on the record, lest a decree should be obtained against a dead person which is of no legal effect. The duty cannot be deemed to be discharged once notice is served on the respondent. A suit or appeal abates automatically after the expiration of ninety days of the death of the deceased defendant or respondent.

Under common law a right of action is said to "abate" on the death of a defendant, it does not simply mean its suspension or discontinuance, it means an extinguishment of the very right of action itself. The right of prosecuting the suit is effectually wiped out as if it had never existed. When a suit abates, it ceases, terminates or comes to an end prematurely. In the common law sense, therefore, when a suit abates it is absolutely dead but in equity a suit when abated was merely in a state of suspended animation and might be revived.

... If the applicant satisfies the Court that there was no want of diligence on his part, that he acted in good faith and not in a negligent manner, his inaction may not be visited with grave consequences. In other words, it is for him to allege and prove not only that he remained ignorant of the death of the deceased and thus could not bring his legal representatives on the record, but further to show that his ignorance could not be attributed to absence of negligence or want of sufficient vigilance."

11. In the above cited case in order to avoid remand it was considered whether there was sufficient evidence or circumstances indicating sufficient cause for condoning the delay. By taking note of the conditions resulting from the partition of the country were exceptional, as very large sections of population on both sides of the frontier were forced to migrate under unusual and unprecedented circumstances and it was humanly impossible for the plaintiffs in that case to keep trace of the defendants who had no settled abode, and were scattered all over the country without there being any clue or information of their whereabouts. Therefore considering that the plaintiffs' conduct in that case could not be blameworthy or negligent abatement was set aside. The Sub-Judge, was directed to proceed with the case after bringing the legal representatives of the deceased parties on the record.

12. As the law laid down in AILR 1960 (FB) Punjab 35 got confirmed by the Supreme Court in Ram Charan's case (supra), the earlier verdict in Secretary of State v. Vinjamuri Kistnamacharyalu (AIR 1938 Madras 218) (DB) and in Ramalingam v. Koteswara Roa (AIR 1949 Madras 624) that the fact that the applicant seeking to set aside the abatement was not aware of the death of the party whose legal representatives have to be brought on record, constituted a sufficient cause, for condoning the delay, in seeking to set aside the abatement is no more good law. This is the effect of the verdict of the Supreme Court in Ram Charan's case, and that Supreme Court's verdict only countenanced the Full Bench judgment of the Punjab High Court in (AIR 1960 Punj 335), wherein it was held that "a party who has obliged to apply for impleading legal representatives of the deceased opponent to allege and prove, not only that he remained ignorant of the death of the deceased, but also that his ignorance could not be attributed to absence of negligence or one of sufficient vigilance on his part."

13. Now coming to the facts of the case even during the pendency of C.M.A.No.1313 of 1993 before this Court, the endeavour to serve notice on 10th Respondent (Somasundaram) failed only on the view expressed by the process wing of the Court that the said Somasundaram died. Even then there was lack of diligence on the part of this 1st Respondent/sole Plaintiff to take further steps in impleading L.Rs. In the C.M.A. Itself which was pending in this High Court. Thus, there was an opportunity for him to know the death of the 10th defendant even during the C.M.A. Proceedings. No diligence was shown by the first Respondent/the sole plaintiff either to implead the legal representatives or even later on to file an application to set aside the abatement and to file an application under Section 5 of the Limitation Act for condoning the delay in filing an application to set aside the abatement. Therefore, the first respondent/plaintiff cannot maintain the suit against the deceased 10th defendant as the suit already got abated.

14. However, the first respondent/plaintiff is a poor man who filed the pauper O.P., as early as in the year 1989 and was declared pauper by this Court in 2001 and was able to get his O.P., converted into suit only in the year 2001. His grievance also was that with the influence of Revenue Officials, his lands were taken away by influential defendants. So far as the specific portion of land in the subject matter of suit taken away by the deceased 10th defendant, even though his suit against the 10th defendant got abated, in all fairness and in the interest of justice, he shall have to be permitted to proceed against the

remaining defendants regarding the other properties. Negation of such rights on the face of its allegation of oppression with influence upon individuals in power, and that too, after 14 long years of fight to get him declared even as indigent, may cause miscarriage of justice.

15. This situation is fortified in a case law reported in State of Punjab v. Nathuram (AIR 1962 SC 89). In that case it was held that ' when there was no abatement of the appeal against the co-respondent of the deceased respondent, there can be no question of abatement of appeal against them, regarding which the following observation was made:-

"The question whether a court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary reliefs against those respondents alone who are still before the court and © when the decree against the surviving respondents, if the appeal succeeds, will be ineffective, that is to say, it could not be successfully executed."

16. Even though the facts of the case did not allow the suit to be continued against the co-defendants the principle was very much laid down, as above, which was later on referred in Punjab State v. Kabul Singh and others (AIR 1968 Punjab and Haryana 340).

17. Thus, this Civil Revision Petition is allowed in so far as the deceased 10th defendant Somasundaram and his legal representative, the Revision petitioner is concerned. In other respects the suit may continue against other co-defendants. The order dated 10.01.2004 passed in I.A No.142 of 2002 in O.S.No.264 of 2001 on the file of the Principal Subordinate Judge, Cuddalore is set aside. No costs. Consequently, C.M.P.No.19223 of 2004 and V.C.M.P.No.7589 of 2005 are closed. The trial Judge is directed to dispose the case before the end of 2006, without requiring any further time, which may only be considered in extraordinary circumstances.

gr.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Principal Subordinate Judge, Cuddalore.

+ 1 cc to Mr.G. Krishnamurty, Advocate SR No.1657

+ 1 cc to Usha Raman, Advocate SR No.1951

TEJ (CO)
SR/21.1.2006

ORDER IN
C.R.P. (PD) NO.2006 OF 2004

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